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NO. 80-2165

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

JAMES L. MURPHY, PETITIONER

V.

EUGENE L. HUNT, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA

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BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA

CONSENT OF PARTIES

All Parties have consented to the filing of this brief of amicus curiae. Letters of consent have been lodged with the Court.

INTEREST OF AMICUS CURIAE

The Legal Foundation of America ("LFA") is a non-profit corporation supporting the operations of a public interest law firm. Its goals include, among others, the pro-

tection of economic freedom, the attainment of a fair balance between the federal government and the States, and the preservation of a rational system of criminal justice. All litigation undertaken by LFA is approved by its board of Trustees, a majority of whom are attorneys. LFA is funded by contributions and does not receive private fees.

LFA does not express an interest in the precise provision of the Nebraska Constitution at issue here. However, LFA does believe that limited denial of bail is essential to a rational system of criminal justice. Furthermore, LFA submits that this honorable Court should not restrict the fifty sovereign States to a single, specific form of bail denial statute. For example, the District of Columbia model of bail denial has been advanced by some as a "preferable" model. That statute does have certain characteristics to recommend it, but it is not unambiguously superior to the Nebraska

model. The Nebraska provision at issue here has certain advantages that are not shared by the District of Columbia model.

STATEMENT OF THE CASE

Eugene L. Hunt was arrested and charged in Omaha with four particularly obnoxious rapes, involving the use of guns or knives, one committed against a 13-year-old girl. He was denied bail pursuant to a Nebraska constitutional provision applicable to "sexual offenses involving penetration by force . . . where the proof is evident or the presumption great." This provision had been enacted recently, in 1978, by a popular vote of 356,000 to 80,000, or more than four to one.

For purposes of the bail denial hearing, Hunt stipulated that the proof of his guilt "was evident or the presumption great." He then brought an action in the District Court, below, for his release. The District Court denied relief. The Court of Appeals, how-

ever, reversed. It held that there was a constitutional right to bail in all non-capital cases, and it struck down the Nebraska provision. That decision is now under review in this case.

SUMMARY OF ARGUMENT

I.

Examination of the history of the "excessive bail" clause overwhelmingly indicates that it is not a guaranty of a right to bail. Pre-Constitutional England recognized nonbailable offenses. So did the American colonies and the Pre-Constitutional States. Significantly, these sovereignties allowed bail denial to be done precisely as Nebraska has done it -- by offense category, not by individual offender characteristics.

The historical purpose of the excessive bail clause was to prevent discriminatory application of discretionary bail amounts by local officials and by the King's justices. Accordingly, the excessive bail

clause is a check on the abuse of discretion against individuals by courts, not a prohibition upon uniform and nondiscriminatory legislative enactments.

II.

"Evolving standards of decency" should not be used, expressly or impliedly, to depart from the original intention of this clause. Even if such standards are used, the strong popular vote for this constitutional provision shows that it is not inconsistent with contemporary standards.

III.

This Honorable Court should not prefer an individualized evaluation of dangerousness to other statutory models for bail denial, including dangerous offense categories. Specifically, the Court should not approve the District of Columbia model to the exclusion of other models. The individual-discretion model is arguably less consistent with the purpose of the excessive

bail clause, since it introduces elements of judicial discretion that can be abused. Furthermore, there is some evidence that the best predictor of dangerousness is recent behavior; individualized, personality-based predictions of dangerousness are arguably less reliable.

It could thus be argued that the Nebraska model is more clearly consistent with the purpose underlying the excessive bail clause than the District of Columbia model. This brief does not depend upon that argument, however. In a federal system, this Court should allow different kinds of statutes to exist among the fifty States, and it should not attempt to decide which model is "best" or to impose that judgment upon the legislative branch.

IV.

The due process and equal protection clauses are, of course, applicable to bail denial and set minimum standards here.

I. THE HISTORY OF THE "EXCESSIVE BAIL" CLAUSE SHOWS THAT IT IS A GUARANTY AGAINST DISCRIMINATORY AMOUNTS UNDER DISCRETIONARY BAIL STATUTES, NOT A WHOLESALE GUARANTY OF BAIL IN ALL NONCAPITAL CASES.

"[A] study of the constitutional and statutory provisions which regulate the system of bail in the United States, while revealing an increased regard for the rights of the individual, will nevertheless indicate that there is no constitutional right to bail." Duker, The Right to Bail: A Historical Inquiry, 42 ALBANY L. REV. 33, 34 (1977) [hereinafter cited as Duker] (emphasis added). Duker's is the most thorough recent work on the subject. Indeed, it was cited by the Court of Appeals, even though that Court did not accept Duker's conclusion. The evidence marshalled by Duker is overwhelming.*

A. English Antecedents of the Excessive Bail Clause Acknowledged the Existence

* Accord, Meyer, Constitutionality of Pretrial Detention, 60 GEO. L.J. 1145-64 (1972).

of Legislatively Created Nonbailable Offenses and Were Concerned with Arbitrary Administration of Bail.

The first systematic treatment of bail in England was brought about by the Assize of Clarendon in 1166. Prior to that time, all offenses were bailable. The Assize asserted a new interest of the King in law enforcement. It resulted in a list of non-bailable offenses, including "those arrested by our special command, or that of our chief justice, or for an offense in our forest, or for any other [wrong] for which, according to English custom, he is not replevisable." Duker 44-45. Thus began the tradition of non-bailable offenses, which has continued to the present.

The defect in this system was not the existence of nonbailable offenses. Instead, it was the discretionary administration of the system by local officials who often extracted bribes as a condition of release. The Statute of Westminster I contained an

explicit list of bailable and nonbailable offenses. Duker 45-47. It was hoped that the legislative enactment, which defined availability of bail by offense categories rather than by custom, would remove the discretion that created abuses.

The statute was ineffective to curb local officials, however. By stages, the following occurred: local officials were put under national supervision; local officers were fired wholesale, tried, and reappointed; and local officers were made personally liable in damages. Still, Parliament reported the usage of ransoms without regard for "law, reason or christianity." Duker 47-56. None of this concern was with the existence of nonbailable offenses, but rather with abuses of discretion.

Finally, during the 16th century, Parliament reaffirmed the Statute of Westminister I, with its category of bail-

able and nonbailable offenses, and the cumulative total of its interventions improved local administration. In addition to the nonbailable offenses created by Westminister I, Parliament created others, including certain "vagabonds." Duker 56-58.

During the 17th Century, discretionary and arbitrary denial of bail, engaged in by the King, became a serious issue. By the Petition of Rights, in 1628, Parliament caused the King to accept the "law of the land" (i.e., the list of nonbailable offenses of Westminister I) as the authority for denial of bail. He frustrated this law by delays in habeas corpus, prompting the Habeas Corpus Act of 1677. It provided for bail to be set within 3 days "in any sum, according to [the judge's] discretion, . . . unless . . . for such Matter or Offenses for which by law the prisoner is not bailable." Duker 58-66.

This law enforced Westminister I,

requiring the prompt setting of bail for bailable offenses only. The King's justices frustrated it, however, by requiring bail in excessive amounts for bailable offenses as a means of denying bail. Thus ten years after the Habeas Corpus Act, Parliament passed, and the King accepted, the English Bill of Rights. It closed the loophole by declaring that "excessive bail ought not to be required." This Act did not affect non-bailable offenses, which continued as enacted. Duker 66.

Since the American Constitution's excessive bail clause was derived from the English Bill of Rights, this history should be illuminative of its meaning. The English Bill did not change the long history of bail denial by statutory enactment. Bail denial was done by offense category, just as Nebraska has done. The concern of the excessive bail clause was with discretionary decisions designed to frustrate the right

to bail for bailable offenses. The same concern was expressed in every reform measure following Westminister I, and no reform measure amounted to an effort at wholesale bail guarantees.

B. The Pre-Constitutional American States Recognized Legislative Creation of Non-Bailable Offenses.

Pre-constitutional States recognized the denial of bail by offense categories. Six of the colonies -- Connecticut, Delaware, Georgia, Maryland and Rhode Island -- simply adopted the rights guaranteed in England. Duker 80-81. "However, Englishmen in the homeland possessed no right to bail beyond that allowed by the legislature." Id. In Virginia, the Statute of Westminister I was the "core of the law defining which offenses were bailable." Id. at 78. The colonial Virginia legislature enacted protections for persons obtaining bail, "in such case as by law he or she may be bailable." 3 Va. Stat. 391 (Hening ed. 1923).

In Massachusetts, bail gauranties did not extend to capital cases, contempt of court, or offenses excluded by express act of the legislature. New York and Pennsylvania adopted colony charters limiting denial of bail to capital offenses, but at certain times they had charters allowing broader bail denial.

After 1776, under the Articles of Confederation, the States made even more clear the legislative power to deny bail. In three states, excessive bail was prohibited to be required "by courts," leaving the legislature free to enact denials of bail. In two others, excessive bail was prohibited "for bailable offenses." Three merely enacted denials of excessive bail, and the legislatures freely continued to deny bail. The remainder adopted English law, which allowed legislative bail denial. Duker 81-82.

There are other authors who have con-

cluded that the excessive bail clause creates "an absolute right to bail." E.g., Foote, The Coming Constitutional Crisis in Bail (Pt. I.), 113 U. PA. L. REV. 959 (1965). Foote asserts that Mason, as draftsman, lifted the clause from the English Bill of Rights, and that "critical language which is in the preamble of the English Bill of Rights . . . clearly spells out the basic right to bail . . . drawn together from enactments which in England went back to 1215." In the first place, the English Bill of Rights contains no such universal right of bail. In the second place, the English history before and after the English Bill of Rights included legislative denial of bail. In the third place, the more immediate antecedent to the language chosen by Mason was the charters of the colonies, which allowed legislative bail denial. In the fourth place, the English Bill of Rights was preceded only 10 years

earlier by the Habeas Corpus Act, which denied bail for "Offenses for which by Law the Prisoner is not bailable," and the English Bill of Rights did not in any wise contravene this express language. See generally Duker, supra, at 84 n. 303; accord, Meyer, supra, 60 GEO. L.J. at 1180-90.

The crime at issue here, rape, was nonbailable in all 13 States at the time of adoption of the Constitution. And while it is true that it was a capital offense, there is no reason to conclude that the Founders would have otherwise regarded it as bailable of right. The Court of Appeals concluded that the only historical reason for bail denial in capital cases was the unlikelihood that any security would ensure appearance for a punishment of death. It is at least as plausible that the long history of selective bail denial in both capital and non-capital offenses was the reason.

II. "EVOLVING STANDARDS" SHOULD NOT PRECLUDE NEBRASKA'S ENACTMENT.

In some cruel-and-unusual-punishment cases, "evolving standards of decency" have been considered as replacing historical constitutional guarantees with contemporary concepts. E.g., Gregg v. Georgia, 428 U.S. 153 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976). It is submitted that this doctrine should not be extended to other constitutional provisions, including the excessive bail clause. The resulting intentional departure from the intent of the framers would reduce the constitution to a public opinion poll.

However, if contemporary attitudes are considered, adoption of this enactment by popular will in Nebraska's Constitution is significant. The majority of more than four to one by which it was passed indicates that it is not inconsistent with contemporary standards of decency.

III. THIS COURT SHOULD NOT REQUIRE THE SEVERAL STATES TO ADOPT A UNIFORM MODEL OF BAIL DENIAL.

The Court of Appeals concluded that denial of bail because the person has committed a legislatively-defined dangerous offense is improper, but that bail might properly be denied upon a judicial holding that the individual himself is dangerous. This reasoning should be rejected.

A. The Nebraska Approach is At Least as Consistent with the Purposes of the Excessive-Bail Clause as a "Dangerous Individual" Approach Would Be.

The Court of Appeal's approach requiring individualized finding of dangerousness introduces judicial discretion of the least controllable variety into the bail denial decision. The likelihood that bail will be denied to poor and racial minorities, and granted to middle-class defendants, is enhanced by this requirement. The Nebraska approach -- that if bail is to be denied, it is to be denied on the basis of conduct,

rather than personality -- treats each individual similarly. It further ensures that the legislature is unlikely to allow preventive detention for any but the most dangerous offenses; if personality factors could be considered, the legislature might lower the behavioral standard by including more offenses. Finally, the Nebraska approach utilizes preventive detention on the basis of what an individual has done rather than who he is.

For these reasons, the Nebraska approach is at least as consistent with the historical purpose of the eighth amendment as would be the approach preferred by the Court of Appeals. Abuses of judicial discretion undertaken on an individual basis provided the motivation for the excessive bail clause. Uniform legislative enactments were not its concern.

B. Nebraska Could Rationally Have Concluded that Behavior Was a More Accurate Predictor of Dangerousness than Personality.

The psychiatric profession insists on its inability to predict dangerousness from personality factors. The most reliable indicator of dangerousness, it appears, is behavior -- the commission of a criminal offense or offenses. See, e.g., A. FREEDMAN, H. KAPLAN & B. SADOCK, SYNOPSIS OF MODERN TEXTBOOK ON PSYCHIATRY 1220-22 (1972). There are even some who insist that "individual" decisions, based on personality, result in serious overprediction of violence.

Nebraska could rationally have accepted this concept. It could have concluded that the most reliable predictor of dangerousness, even in an "individualized" system, would remain the offense itself; that the addition of personality factors would not appreciably improve accuracy, and indeed might decrease it; and that addition of judicial discretion would induce more unconscious invidious discrimination than any gain in accuracy could justify. Such reasoning would ful-

ly comply with the historical purpose of the bail clause to check judicial discrimination.*

Forcible rape is as dangerous and repeatable as Nebraska categorized it. Recidivism rates are very high. Commission of the offense is rarely isolated; many forcible rapists act periodically and commit dozens of similar offenses. Indeed, denying bail for the capital offense of murder while granting it for rape would in at least one sense be irrational, even though favored by the Court of Appeals. Murder has far lower recidivism rates than rape (and this is so even though detection rates are high for murder and low for rape).

C. Nebraska Could Rationally Have Concluded that Bail Denial Was Necessary for Orderly Trial of Forcible Rape Cases.

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* For a defense of the view that judicial prediction of dangerousness can, indeed, be accurately done, see, e.g., Meyer, supra, at 1146-49; see also Jurek v. Texas, 96 S.Ct. 2950 (1976). There can be different views on this question, and there are advantages to both statutory models.

One historical reason for bail denial has been the assurance of an orderly trial. Thus the accused can clearly be denied freedom during the trial itself. Bail denial during trial has, historically, been used even when pretrial bail was allowed, and bail denial has been used as a means of providing security to witnesses and jurors. See Duker, supra, at 109-19.

Orderly prosecution of rape cases depends to a unique degree upon the cooperation of victims whose personal security has been invaded and is still perceived as threatened by the victim herself. And it is to be remembered that Nebraska's bail denial operates only when proof is "evident;" i.e., on overwhelming proof of rape by force. Most bail releases are done early, within hours of the setting of bail, if bail is posted at all. Such release seriously undermines the confidence of the rape survivor in the criminal justice system

and in her own security. Permanent psychological effects can follow, as can an inability to provide for orderly trial. Nebraska's interest in preventing these effects should not be disregarded.

D. This Court Should Not Prefer the District of Columbia Bail-Denial Statute to this Nebraska Provision, Nor Vice Versa.

It has been reported that counsel for Respondent may, in this Court, argue that while some bail denial laws (such as the District of Columbia Model) may be constitutional, Nebraska's law should be struck down as providing "no standards." NATIONAL L. J., Oct. 7, 1981, at 3.

It is true that the District of Columbia model provides certain safeguards that are not provided by this Nebraska law. It provides a requirement of certain fact-findings, requires "dangerousness," and allows only a brief period of detention. However, it is equally true that the

Nebraska provision protects individuals in ways not provided for by the District of Columbia, which makes its findings based on hearsay and does not require strong proof of guilt. Nebraska, by requiring courtroom proof that is "evident," places a higher emphasis upon likelihood of conviction and thus protects more carefully than the District of Columbia against pretrial detention of innocent persons.

The point here is not to argue the inadequacies of the District of Columbia model. Rather, the point is that it is not unambiguously superior to the Nebraska law, as Respondent may argue. It is submitted both laws are constitutional. In a federal system such as ours, there should not be merely one "approved" statutory model of this type.

E. The Bail Denial Provisions of Texas Are an Example of a Statutory Scheme That Should Be Upheld, Though Inconsistent with the Reasoning of the Court of Appeals.

This Amicus Curiae's principal office is in Texas, and accordingly it has greater familiarity with the laws of that State than any other. It is submitted that the Texas bail denial statutes provide an example of a rational, constitutional approach, though it is an approach that conflicts with the Court of Appeals' reasoning.

Texas allows bail denial in three situations: first, in capital cases in which proof is evident; secondly, in certain cases in which the accused has prior convictions or record, on "substantial" evidence of guilt; and third, when the accused is incarcerated pending hearing of a motion to revoke his probation. TEX. CONST. art.1, 11-11a (Vernon Supp. 1981); ex parte Jones, 460 S.W.2d 428 (Tex. Crim. App. 1970).

The most notable category of prior-offense bail denial is that in which the defendant has sequentially been twice before convicted of felonies, so that he is

subject to a quasi-mandatory life sentence upon conviction. This categorical definition is reasonable, even though the statute does not provide individualized factors, both because the potential life sentence, being mandatory, provides incentives for non-appearance and because one twice sequentially* convicted of felonies, and

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* The sequence must be: first crime, first conviction; second crime, second conviction; third crime, third conviction. The mere existence of two prior convictions is not enough to invoke the quasi-mandatory sentence of life imprisonment. Thus two separate incarcerations must precede the current conviction.

TEX. CONST. § 11a also allows bail denial for a previously convicted felon who uses a deadly weapon in the commission of a sequentially later felony crime (such a person being subject, as is a habitual, to an enhanced sentence), and to persons who commit felonies while on bail from previously committed felonies.

In each instance, bail denial may last only 60 days. Strict proof, under the trial rules of evidence, is required (i.e., no hearsay is allowed absent exceptions). No individualized factors are required to be considered; nevertheless, these provisions are rational and constitutional, it is submitted.

shown by "substantial" proof to have committed a third after his two separate incarcerations, can rationally be deemed to be likely to repeat his offense. Cf. Spencer v. Texas, 385 U.S. 554 (1967); Rummel v. Estelle, U.S. (19)(individualized determination of sentence not required). Denial of bail pending probation revocation is appropriate for similar reasons, and for the additional reason that it is a prelude to relatively certain sentencing for an already certain conviction.

The Court of Appeals' opinion, in that it appears to provide an individual right to bail in all non-capital cases, seems to undermine these rational bail denial categories. The Court of Appeals' reasoning is particularly questionable if it requires individualized bail determination in third-conviction, habitual criminal cases, as to which even a life sentence does not require such determination. Rummel v.

Estelle, supra,

IV. THE FOURTEENTH AMENDMENT AND OTHER CONSTITUTIONAL PROVISIONS ARE MINIMUM STANDARDS FOR THIS AND OTHER BAIL DENIAL APPROACHES.

Due process, equal protection and other constitutional provisions are more appropriate minimum standards for bail denial than is the excessive bail clause, given its history and purpose. These provisions would prohibit a bail denial scheme that was arbitrary, unnecessary, or protected by insufficient procedural safeguards.

Equal Protection. Bail denial upon lesser offenses, or distinctions in bail availability for relatively similar situations, might offend the equal protection clause if unreasonable.

Due Process. A fair and full hearing on rational evidentiary principles, a relatively high proof standard, and a brief durational period seem minimum standards under this clause. A standard of "proof ev-

ident" should imply proof that is "clear" and "strong," approaching the beyond-reasonable-doubt standard if not exceeding it. The Texas courts' construction of this requirement, for example, has been stringent; it has led to reversal of the majority of early bail denials even in capital cases on appeal. Ex parte Wilson, 527 S.W.2d 310, 311 (Tex. Crim. App. 1975); Crump, Capital Murder: The Issues in Texas, 14 HOUSTON L. REV. 531, 539-40 (1977)(capital bail denial on "proof evident" standard). There may be some question whether Nebraska courts have followed a unitary or sufficiently high* standard of proof. In addition, there is

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* A survey by Omaha's public defender's office of 32 persons to whom bail was denied under the provision in question apparently has shown that two were convicted of the charge, fifteen were convicted of lesser offenses, two were acquitted, three had charges dismissed, and 10 remained pending. While compromise verdicts or plea bargained convictions may account for many of the lesser-charge convictions (and possibly even some of the dismissals), the re-

no explicit time limit upon Nebraska's denial of bail. Due process may require that the Nebraska legislature or courts supply a test in this regard. Cf. TEX. CONST. art. 1, § 11a, supra (60-day limit for trial of defendant denied bail).

Amicus curiae submits that the Nebraska provision is sufficiently rational and nondiscriminatory to comply with equal protection and substantive due process requirements. It has insufficient information as to the actual application of the provi-

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maining dismissals and acquittals, if the survey is correct, show the need for a high proof standard. See NATIONAL L.J., supra, at 18.

In any event, Amicus curiae submits that these figures are relevant to the proof standard under the due process clause, not to the type of statutory conditions required for bail denial. That is to say, the survey is not peculiar to non-individualized bail denial statutes; indeed, less satisfactory results might flow from a standard with individualized consideration of dangerousness. Due process in the form of strong proof, not application of the excessive bail clause, is the proper constitutional provision to address the issue.

sion to express an opinion on its compliance with procedural due process requirements.

CONCLUSION

This honorable Supreme Court should not disallow bail denial pursuant to valid legislative enactments. It should recognize that the history underlying the excessive bail clause reflects a concern for arbitrary administration of discretionary bail; that it is directed to the courts, not to legislatures; and that it does not disallow uniform and nondiscriminatory enactments for bail denial. Finally, the Court should not require that the several States limit themselves to a single form of statute on bail denial (such as the District of Columbia model). While that model has some features to commend it, so does the Nebraska provision, and it is arguably more consistent with the historical purposes of the excessive bail clause.

The due process and equal protection clauses should, of course, be deemed to set minimum standards for statutes or other provisions for denial of bail.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have, pursuant to Rule 28.3 of this Court, served 3 copies of this Brief by mailing same at the central post office, Houston, Tx., first class postage prepaid, to all counsel of record, addressed to Terry R. Schaaf, 2115 State Capitol, Lincoln, Neb. 68509, and to Bennet Hornstein, Asst. Pub. Defender, 306 Hall of Justice, 17th & Farnham, Omaha, Neb. 68183, on _____, 1981.

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